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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 17, 2009

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 AUG 17 PM 12:09
CHIEF CLERKS OFFICE

Re: **CITY OF PATTON VILLAGE**
TCEQ DOCKET NO. 2009-0913-MWD

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

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TCEQ DOCKET NO. 2009-0913-MWD

**IN THE MATTER OF
THE APPLICATION OF
CITY OF PATTON
VILLAGE FOR PERMIT
NO. WQ0014926001**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

CHIEF CLERKS OFFICE

2009 AUG 17 PM 12:09

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUEST FOR HEARING**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas
Commission on Environmental Quality (the Commission or TCEQ) with a Response to
Requests for Hearing in the above-referenced matter.

I. INTRODUCTION

A. Background of Facility

The City of Patton Village has applied for to the Texas Commission on
Environmental Quality (TCEQ) for a new permit, proposed Texas Pollutant Discharge
Elimination System (TPDES) Permit No. WQ0014926001. The facility will be located
within the city limits of Patton Village, approximately 550 feet west of the intersection of
South Lakeview Drive and Lakeview Drive, in Montgomery County, Texas. The
proposed permit would authorize the discharge of treated domestic wastewater at a daily
average flow not to exceed 350,000 gallons per day. The treated effluent will be
discharged to Peach Creek in Segment No. 1011 of the San Jacinto River Basin.

The designated uses for Segment No. 1011 are high aquatic life uses, public water supply and contact recreation. In accordance with §307.5 and the TCEQ implementation procedures (January 2003) for the Texas Surface Water Quality Standards, an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review preliminarily determined that existing water quality uses will not be impaired by this permit action. The review also concluded that numerical and narrative criteria adequate to protect existing uses will be maintained. A Tier 2 review preliminarily determined that no significant degradation of water quality is expected in Peach Creek, which has been identified as having high aquatic life use. The Tier 2 review also determined that existing uses will be maintained and protected, although this preliminary determination can be reexamined and may be modified if new information is received.

B. Procedural Background

TCEQ received this application on September 15, 2008. On November 24, 2008 the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain Water Quality Permit (NORI) was published in the *East Montgomery County Observer* on December 10, 2009, in Montgomery County. The NORI was also published in Spanish in *La Prensa de Houston* December 11-17, 2008, in Montgomery County. The ED declared the application technically complete on February 5, 2009 and the Notice of Application and Preliminary Decision (NAPD) was published in the *East Montgomery County Observer* on February 18, 2009, in Montgomery County. The NAPD was also published in Spanish in *La Prensa de Houston* February 19-25, 2009, in Montgomery County. The public comment period ended on March 23, 2009 and the deadline to request a contested case hearing was June 12, 2009.

As described in further detail in section II. B. below Adriana Casenave, Gino Garza, Tamara Garza, Gloria Giarruso submitted two letters during the comment period. They prepared a comment letter initially filed by email on March 4, 2009, and a hearing request initially submitted by email on March 18, 2009. The letter requesting a contested hearing on behalf of all four individuals does not state how they are affected or what concerns they have with the proposed permit, but it does reference their "previous

request.” Therefore, OPIC reads these two letters together to find that they have substantially complied with 30 TAC § 55.201(d), and are “affected.”

II. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARINGS

A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts 1999, 76th Leg., ch 1350 (commonly known as “House Bill 801”). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor’s personal justiciable interest affected by the application showing why the requestor is an “affected person” who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TAC § 55.201(d). Under 30 TAC § 55.203(a), an affected person is “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application. 30 TAC §55.211(c).

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

B. Determination of Affected Person Status

The Office of the Chief Clerk received a mailed letter on March 20, 2009 from Adriana Casenave, Gino Garza, Tamara Garza, Gloria Giarruso, (Requestors) requesting a contested case hearing. The Requestors also submitted the letter through fax on March 19, 2009 and through email on March 18, 2009.

In the March 18, 2009 letter, they do not list how they are affected or any concerns that they have with the proposed permit. The Requestors did submit a letter during the comment period, though, on March 4, 2009 through email and again on March 6, 2009 through the mail. In this letter they state that they all own property along Peach Creek and that their children swim in the creek. They also raise concerns about the impact of the proposed discharge.

Taken alone, the March 18, 2009 letter explicitly requesting a hearing does not meet several of the elements for a valid hearing request, as stated in 30 TAC § 55.201(d). But, the Requestors reference their "previous request" which OPIC interprets as being the March 4, 2009 letter. Accordingly, OPIC concludes that the Requestors have

incorporated the substance of their March 4, 2009 letter into the March 18, 2009 letter. Therefore, OPIC finds that the Requestors substantially complied with 30 TAC § 55.201(d). The March 4, 2009 letter and the March 18, 2009 letter read together clearly demonstrate that the Requestors meet the requirements for an affected persons.

When these two documents are read together, they show that the requestors are affected as property owners along Peach Creek, and that they have concerns about the proposed facility and discharge. Therefore they would meet the requirements for requesting a contested case hearing. OPIC recommends the Commission find that the Requestors substantially complied with the requirements of 30 TAC § 55.201(d), and are “affected.”

1. Location of the Individuals’ Property and the Discharge Route

In the NORI, published on December 10, 2008, the discharge route is described as follows;

The domestic wastewater treatment facility is located within the city limits of Patton Village, approximately 550 feet west of the intersection of Lake View Drive, in Montgomery County, Texas. The discharge route is from the plant site via pipe commencing onto the southwest property corner of the City of Patton Village wastewater treatment plant, west 1,450 feet to south Lake View Drive; thence south 1,050 feet along the east Right-of-Way of south Lake View Drive; thence west 550 feet along a private easement; thence to Peach Creek.

In the NAPD, published on February 18, 2009 and in the Executive Director’s Response to Comments (RTC), dated May 11, 2009, the discharge route is described differently, as follows;

The treated effluent will be discharged to Peach Creek in Segment No. 1001 of the San Jacinto River Basin.

The ED’s map, created for Commissioners Agenda¹ seems to show the discharge route as it is described in the NORI, and seems to include the 1/3 mile of pipe that carries the effluent to Peach Creek.

For clarification, OPIC asserts that the “discharge route” should not be interpreted to include the 1/3 of a mile that the effluent travels from the facility to Peach Creek in the

¹ See Attachment A for ED’s map.

enclosed pipe. It would be inappropriate to determine the distance between the discharge point and the Individuals property as beginning at the facility, when the effluent will have no opportunity to mix or dilute until it reaches Peach Creek. The discharge route begins when the effluent enters waters of the state, in this case, Peach Creek. All of the Requestors live within less than a mile of the point where the discharge will enter Peach Creek. Given their proximity to the discharge point and the interests the Requestors seek to protect, they are affected persons.

C. Issues Raised in the Hearing Requests

The Requestors raise several issues. They state they are concerned about the wastewater contributing to excess bacteria in Lake Houston and that the treated wastewater will come into their backyards. They also express concern about whether the discharge will affect Peach Creek's ability to meet state water quality standards and whether it will affect their ability to recreate in the waterway. The Requestors question how the proposed daily average discharge will affect them, should the creek flood.

D. Issues raised in Comment Period

All of the issues were raised during the comment period, as the letter requesting a hearing and the letter outlining how they are affected and their concerns were both submitted during the comment period.

E. Disputed Issues

There is no agreement between hearing requesters and the Applicant or Executive Director on the issues raised in the hearing requests.

F. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. All of the issues raised are issues of fact. *See* 30 TAC §55.211(b)(3)(A) and (B).

G. Relevant and Material Issues

Hearing requests may raise issues relevant and material to the Commission's decision under 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.² Relevant and material issues are those governed by the substantive law under which this permit is to be issued.³

The Requestors raise concerns that the proposed facility will have an adverse impact upon water quality in Peach Creek and upon bacteria levels in Lake Houston. The Individuals also express concern about whether the discharge will affect their recreational interests in the stream. And, the Requestors want to ensure that the Peach Creek meets TCEQ water quality standards. These are all relevant and material issues. TCEQ is charged with maintaining the quality of Texas water, consistent with public health and enjoyment. TWC §26.003. *See also* 30 TAC § 307.1. Specifically, issues concerning the permitted activity's effect on surface and ground water quality are relevant and material to the Commission's decision. 30 TAC § 307.1 charges the TCEQ with using all reasonable methods to maintain Texas water quality. Further, 30 TAC § 309.12 prohibits the TCEQ from issuing a permit unless it will minimize possible contamination of surface water and groundwater." Therefore these are relevant and material issues.

The Requestors question whether they will be affected by the daily average discharge in the event of a flood. TCEQ does not generally address flooding in this context. The permitting process, governed by Chapter 26 of the Texas Water Code (TWC), does not give the TCEQ jurisdiction to regulate wastewater discharge based on general flooding concerns. But flooding could be considered a relevant factor when the ED evaluates whether the proposed discharge site "minimizes possible contamination of surface water and groundwater". 30 TAC § 309.12. When the ED is making this determination, it must consider "active geological processes" such as erosion or meandering river bank cutting. 30 TAC § 309.12(1) and 30 TAC § 309.11(1). These

² *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

³ *Id.*

processes may involve localized flooding. In addition, TCEQ requires applicants to provide protection of the wastewater treatment facilities if it will impact any nearby flood plains. Therefore, this issue is not relevant and material, although it may be raised in connection with other issues.

Requestors also express concern regarding whether the wastewater will come directly into their backyard. Insofar as the Requestors are questioning whether the discharge route will cross their property, this is not a relevant or material issue relating to the issuance of these permits because “[a] permit issued...does not convey any property rights of any sort, nor any exclusive privilege” to the Applicant. 30 TAC § 305.122 (b). Neither does “[t]he issuance of a permit...authorize any injury to persons or property or an invasion of other property rights, or any infringement of state or local law or regulations.” 30 TAC § 305.122(c). *See also* 30 TAC § 305.125(16). The Applicant must acquire all property rights necessary to use the proposed discharge route before it could operate under the proposed permit. Because the applicant has no right to discharge across private property without the landowner’s permission, this is not a relevant and material issue.

H. Issues Recommended for Referral

OPIC recommends the Commission refer the following disputed issues of fact to the State Office of Administrative Hearings for a contested case hearing:

1. Will the proposed discharge impact Peach Creek’s ability to meet TCEQ water quality standards?
2. Will the proposed discharge impact the hearing requestors use of Peach Creek for recreational purposes?
3. Will the proposed discharge contribute to elevated bacteria levels in Lake Houston?

I. Maximum Expected Duration of Hearing

Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for

decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

III. CONCLUSION

OPIC recommends the Commission grant the hearing requests of Adriana Casenave, Gino Garza, Tamara Garza, Gloria Giarruso and refer the above-referenced issues to the State Office of Administrative Hearings.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: 
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TEXAS
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ON ENVIRONMENTAL
QUALITY
2009 AUG 17 PM 12:10
CHIEF CLERKS OFFICE

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2009 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Amy Swanholm

Attachment A

City of Patton Village Map Requested by TCEQ Office of Legal Services for Commissioners Agenda



Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
P.O. Box 13087
Austin, Texas 78711-3087

August 4, 2009

0 500 1,000 2,000 3,000 Feet

Projection: Texas Statewide Mapping System
(TSM5)
Scale: 1:28,000

Legend

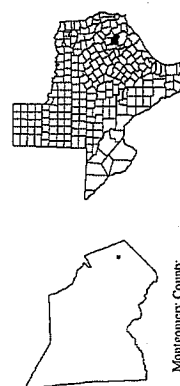
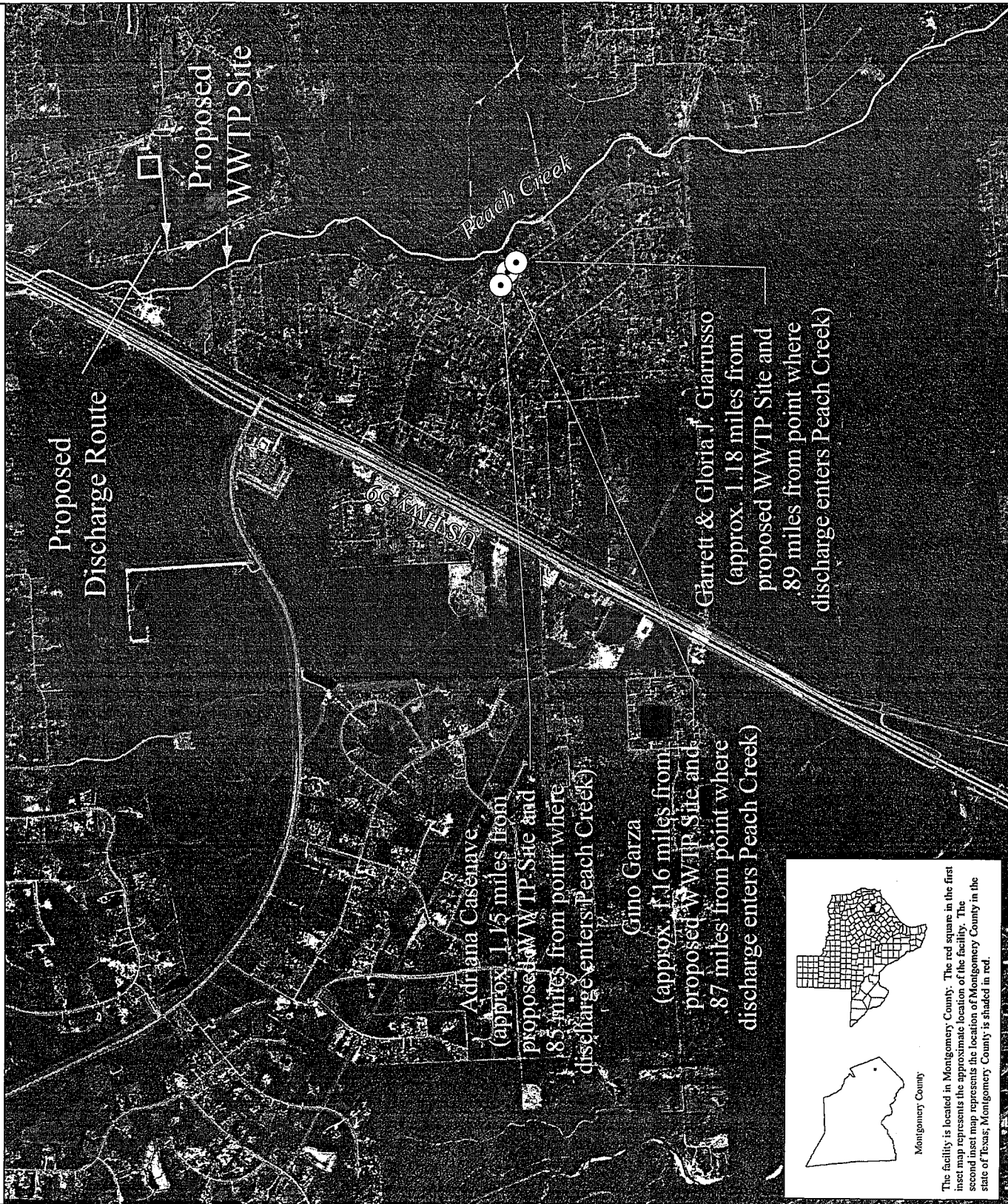
- Proposed Facility
- Proposed Discharge Route

Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information and the requester information from the applicant. The counties are U.S. Census Bureau 1992 TIGER/Line Data (1:100,000). The background of this map is a source photograph from the 2004 U.S. Department of Agriculture Imagery Program. The imagery is one-meter Color-Infrared (CIR). The image classification number is K157_1-1.

This map depicts the following:
(1) The approximate location of the facility. This is labeled "Proposed WWTP Site".
(2) The proposed discharge route. This is labeled "Proposed Discharge Route".

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This map was not generated by a licensed surveyor, and is intended for illustrative purposes only. No claims are made to the accuracy or completeness of the data or to its suitability for a particular use. For more information concerning this map, contact the Information Resources Division at (512) 239-0800.

M/McDonough, C/P-090427028



The facility is located in Montgomery County. The red square in the first inset map represents the approximate location of the facility. The second inset map represents the location of Montgomery County in the state of Texas; Montgomery County is shaded in red.

**MAILING LIST
CITY OF PATTON VILLAGE
TCEQ DOCKET NO. 2009-0913-MWD**

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